Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-1811

* * *

TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

DAVID M. KENDALL
Thompson & Knight
Two Wahrenberger House
208 West Fourteenth Street
Austin, Texas 78701
(512) 474-8211

Attorneys for Petitioner

June 1979

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED 3

STATEMENT OF THE CASE 6

ARGUMENT 9

CONCLUSION 19

CERTIFICATE OF SERVICE 20

APPENDIX A:

Opinion of the Court of Appeals dated April 9, 1979 ..... A-1

APPENDIX B:

Memorandum and Order of United States District Court dated May 5, 1978 ..... B-8

APPENDIX C:

Opinion of the United States District Court dated February 18, 1977 ..... C-15

APPENDIX D:

Order of Court of Appeals dated May 7, 1979 ..... D-20

APPENDIX E:

Public Accountancy Act of 1945 of State of Texas, art. 41a, Vernon's Texas Civil Statutes E-22

APPENDIX F:

Stipulation of the Parties F-52

INDEX OF AUTHORITIES

CASES: **Page**

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 10, 11, 12, 13, 15, 19

Cantor v. Detroit Edison Co.,
428 U.S. 579 (1976) 11, 12, 15

City of Lafayette v. Louisiana Power and Light Co.,
435 U.S. 389 (1978) 11, 15

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 11, 13, 14, 15

Lewis v. Jacksonville Building & Loan Ass'n.,
540 S.W.2d 307 (Tex. 1976) 15

New Motor Vehicle Board v. Fox,
___U.S.___, 99 S.Ct. 403,
58 L.Ed.2d 361 (1978) 15

Oxford v. Hill,
558 S.W.2d 557 (Tex.Civ.App.-Austin
1977, writ ref'd) 15

Parker v. Brown,
317 U.S. 341 (1943) 7, 10, 11, 12, 13, 14, 15, 16, 18, 19

Princeton Community Phone Book, Inc. v. Bate,
582 F.2d 706 (1978), *cert. den'd* ___U.S.
___, 95 S.Ct. 454 (1978) 10, 15

OTHER AUTHORITIES:

Federal Rules of Civil Procedure
Rule 12(b) 7
Rule 56(c) 19

United States Code
Title 15, Sec. 1 6
Title 15, Sec. 4 9
Title 28, Sec. 1254(1) 2

Vernon's Texas Civil Statutes
Article 41a 4
Article 664-4 16

INDEX OF AUTHORITIES, continued

Vernon's Texas Civil Statutes, continued
Article 6252-17 15
Article 6252-17a 15

Texas Rules of Civil Procedure
Rule 483 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. _____

* * *

TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, the Texas State Board of Public Accountancy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause on April 9, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 592 F.2d 919. A copy may be found as Appendix A. The memorandum opinion and order of the United States District Court for the Western District of Texas, Austin Division, rendered on May 5, 1978, is reported at 464 F.Supp. 400. A copy is attached as Appendix B. The earlier opinion of the District Court dated February 18, 1977, overruling Petitioner's Motion to Dismiss, is not reported. A copy, however, is attached as Appendix C.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on April 9, 1979 (see Appendix A). A copy of the Court's order of May 7, 1979 denying the Petition for Rehearing En Banc is attached as Appendix D.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a board, created by a state legislature with its members appointed by the state governor by and with consent of the state senate and having authority to promulgate and adopt rules of professional conduct "appropriate to establish and maintain a high standard of integrity in the profession," is subject to the Sherman Act in the adoption and enforcement of such rules?

2. Where a state legislature, in providing for promulgation of rules of professional conduct by a board created to regulate a profession, requires that proposed rules be submitted to the vote of the members of the profession for approval, do such members, by participating in such a vote with reference to a rule having anticompetitive effects, thereby engage in a combination or conspiracy to fix prices in violation of the Sherman Act?

3. Where, in compliance with its statutory authority, a board created to regulate a profession promulgates rules of professional conduct having anticompetitive effects, does acquiescence in that regulation by a member of the profession constitute participation in a combination or conspiracy in violation of the Sherman Act?

4. Where an affidavit is submitted in opposition to a motion for summary judgment with particular

reference to legislative intent, is it error for the district court to determine, on a motion for summary judgment, as a matter of law, that a state legislature did not contemplate the adoption of a rule of professional conduct having an anticompetitive effect when it authorized a state board to adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession and that adoption and enforcement of such a rule resulted from a combination or conspiracy to fix prices in violation of the Sherman Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This suit is an attack on Rule 14 of the Rules of Professional Conduct promulgated by Petitioner, the Texas State Board of Public Accountancy. As of January 1, 1976, it was renumbered as Rule 401.03.00.014. In accordance with paragraph 2 of the memorandum opinion and order of the district court of May 5, 1978 (Appendix B), this rule was rescinded in early 1979. It provided:

> "Competitive Bids. A public accountant shall not make a competitive bid for professional services.
>
> "(a) A competitive bid is defined as a proposal by a public accountant to a prospective client to perform professional services when such proposal quotes the compensation to be received for such services and it is given with the knowledge that similar proposals are being solicited concurrently from one or more other public accountants. The fact that a public accountant is solicited to make a proposal by a person or organization not already his client is indicative that similar proposals are being solicited from other public accountants and it

shall be incumbent upon the public accountant to assure himself to the contrary by direct inquiry.

"(b) Any proposal made under the foregoing circumstances is a competitive bid whether the proposed compensation is stated as a lump sum, a maximum amount, or any form of unit price, including per diem or per hour rates with or without a maximum sum."

The Public Accountancy Act of 1945, TEX.CIV.STAT.ANN. art. 41(a), is found in its entirety as Appendix E to this Petition. Certain pertinent provisions are:

"* * * *

"Sec. 4. The Texas State Board of Public Accountancy shall consist of nine (9) members, each of whom shall be a citizen of the United States and a resident of this State. Members of the Board and their successors shall be appointed by the Governor, with the advice and consent of the Senate, and shall be accountants in public practice. . . .

"* * * *

"Sec. 5. The Board shall administer the provisions of this Act. The Board shall formally elect a chairman and a secretary-treasurer from its members and may adopt such rules as it deems necessary for the orderly conduct of its affairs. The Board may promulgate, and may amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy, after notice to all holders of valid permits to practice public accountancy in this State. Such notice shall set forth the

proposed rules of professional conduct, or amendments, and the time when same shall be voted on by public accountants holding valid permits under this Act. No such rule or amendment shall be operative until approved by a majority of those voting at such election....

"* * * *

"Sec. 7. All expenses incurred under this Act shall be paid from the fees collected by the Board under this Act. No expenses incurred under this Act shall ever be a charge against the funds of the State of Texas. The Board shall, as of December 31, 1946, and annually thereafter, report to the Governor of the State of Texas the receipts and disbursements under this Act, for each calendar year.

"Sec. 8. (a) No person shall assume or use the title or designation 'certified public accountant,' or the abbreviation 'C.P.A.' or any other title, designation, words, letters, abbreviation, sign, card or device tending to indicate that such person is a certified public accountant, unless such person has received a certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts....

"* * * *

"Sec. 22. (a) After notice and hearing as provided in Section 23 of this Act, the Board may revoke or may suspend for a period not to exceed five (5) years, any certificate issued under Sections 12 or 13 of this or any prior Acts, or any registration granted under Sections 10 or 14 of this or any prior Acts, or may revoke, suspend or refuse to renew any permit issued under Sections 9 or 13 of this Act, or may

reprimand the holder of any such permit for any one or more of the following causes:

"* * * *

"(4) violation of a rule of professional conduct promulgated by the Board under the authority granted by law. . . ."

The applicable portion of Section 1 of the Sherman Act (15 U.S.C. §1) is:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

STATEMENT OF THE CASE

In 1945, the Texas Legislature, by the adoption of the Public Accountancy Act of 1945 (Appendix E), created Petitioner, the Texas State Board of Public Accountancy, and, among other things, authorized it to promulgate rules of professional conduct "appropriate to establish and maintain a high standard of integrity in the profession of public accountancy." One of the first such rules promulgated in 1946 was Rule 14 which prohibited competitive bidding for professional engagements. That rule or one with similar effect was maintained by the Board until 1979, when it had to be abandoned because of the order of the United States District Court in this case.

This suit was commenced by the United States in November of 1976, complaining of Rule 14 as the product of an unlawful combination and conspiracy to restrain price competition. The United States sought injunctive relief only.

The Texas State Board of Public Accountancy (hereafter the "Board"), responded to the complaint

with a motion to dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure, urging that the Sherman Act does not apply to and was not intended to restrain state action or official action directed by a state. It asserted as the basis for the motion that the rule of which the United States complained was the exercise by the State of Texas of its legislative authority to regulate the profession of public accountancy and to prescribe conditions of its practice in the State of Texas. The motion specifically cited *Parker v. Brown*, 317 U.S. 341 (1943). On February 18, 1977, the United States District Court issued its order overruling the motion to dismiss. That order is found as Appendix C.

The answer filed by the Board asserted, among other things:

> ". . . At the time of the adoption of that statute [the Public Accountancy Act of 1945] it was contemplated and intended by the Legislature that one of the rules and regulations so adopted would be a rule in the language of or similar to Rule 14 here questioned by the Plaintiff. Since the adoption of Rule 14, the Public Accountancy Act of 1945 has been the subject of a number of amendments by the Texas Legislature but at no time has the Legislature, with knowledge of the existence of Rule 14, made any attempt to cause its repeal or amendment."

The parties entered into a stipulation which, without its voluminous exhibits, is found as Appendix F. The United States then filed a motion for summary judgment, supported by the affidavit of Hays Gorey, Jr. The Board responded, asserting that the United States was not entitled to summary judgment because there were genuine issues as to material facts, i.e., as to the existence of any contract, combination or conspiracy and as to whether or not any restraint imposed by the

Rules of Professional Conduct was reasonable. The response further asserted that, as a matter of law, the rules promulgated by the Board were not subject to the restrictions imposed by the Sherman Act.

The Board also filed its motion for summary judgment, asserting again, that, in adopting Rule 14 of its Rules of Professional Conduct, it was not subject to the Sherman Act. It filed the affidavit of Lloyd Weaver, which established much of the background for Rule 14 and the reasons for its promulgation. On May 5, 1978, the Court granted the motion of the United States and denied that of the Board. Both its memorandum opinion and order and judgment issued on the same date recite:

> "1. That Defendant be enjoined from continuing, maintaining, or renewing the above-stated conspiracy and combination and from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having similar purposes or effects, and from adopting, ratifying, or following any plan or practice having similar purposes or effects;
>
> "2. That Defendant be enjoined from promulgating, publishing, distributing or otherwise suggesting any rule prohibiting competitive bidding by Defendant's permit holders;
>
> "3. That Defendant be required to cancel those provisions of its rules of professional conduct which have as their purpose or effect the suppression or elimination of price competition among Defendant's permit holders;
>
> "4. That Plaintiff recover the costs of this suit."

The Board filed a motion for stay in the District Court and on June 4, 1978, that court issued its order, staying the injunctive provisions of the judgment of May 5, 1978, during the pendency of an appeal to the Court of Appeals, the stay to expire on issue of a mandate affirming the judgment by the Court of Appeals. The Board has moved for a stay of mandate in the Court of Appeals.

Pending the issuance of an affirming mandate, the Court further ordered and adjudged that the Board be enjoined from enforcing or threatening to enforce Rule 14 of its Rules of Professional Conduct and from adopting, ratifying, or following any rule, plan or practice having similar purposes or effects.

On April 9, 1979, the United States Court of Appeals, in a per curiam opinion, deleted from the memorandum and order and judgment of May 5, 1978, the paragraph numbered 3, and as modified affirmed the judgment "on the basis of the opinions of the district court dated February 18, 1977, and May 5, 1978, 464 F.Supp. 400."

Circuit Judge Gee dissented with an opinion.

On April 23, 1979, the Board requested rehearing en banc and on May 7, 1979, the panel of the Court of Appeals denied the petition. Judge Gee dissented from the denial of the petition for rehearing en banc for the reasons stated in his dissent from the panel opinion.

Jurisdiction was asserted in the United States District Court under Section 4 of the Sherman Act. (15 U.S.C. §4).

ARGUMENT

The importance of the questions presented by this Petition cannot be overestimated. The decisions of the District Court and of the Court of Appeals, if permitted to stand, will have far-reaching effects. At the very

least, they will create confusion as to the extent of the authority of state regulatory boards to promulgate rules of professional conduct - a most important function of such boards - when such rules may have an anticompetitive effect.

Furthermore, the decisions of the courts below conflict with the decisions of this Court in *Parker v. Brown*, 317 U.S. 341 (1943) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and with the decision of the United States Court of Appeals for the Third Circuit in *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (1978), *cert. den'd* ___U.S.___, 95 S.Ct. 454 (1978).

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that the Sherman Act did not apply to state action, saying:

> ". . . We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its Legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350-351.

> ". . . Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program,

> approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy . . . The State itself exercises its legislative authority in making regulation and in prescribing the conditions of its application. . . ." 317 U.S. at 352.

Although there have been a number of later decisions touching various aspects of the holding of *Parker*, the integrity of that holding and its force have in no way been lessened. It still is the law.

City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978), relied on by the district court to avoid the *Parker v. Brown* holding, does not override that holding. The question in that case, as stated by Mr. Justice Brennan, was:

> "*Parker v. Brown*, . . . held that the federal antitrust laws do not prohibit a State 'as sovereign' from imposing certain anticompetitive restraints 'as an act of government.' The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints." 435 U.S. at 391.

While concluding that *Parker* did not hold that all governmental entities were outside the reach of the Sherman Act, the majority opinion in its Part II entered into an analysis of *Parker v. Brown* and of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and, in a footnote, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), then the most recent Supreme Court decisions touching upon the *Parker* doctrine. From its analysis, the Court in *City of Lafayette* concluded:

> ". . . that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. . . ." 435 U.S. at 413.

In *Bates v. State Bar of Arizona, supra*, the Court, in holding that no cause of action was stated under the Sherman Act because of *Parker*, distinguished *Cantor* on three grounds:

> "First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or a public agency, rather than against a private party." 433 U.S. at 361.

In *Bates* it was the Arizona Supreme Court which was the real party in interest, which adopted the rules and which was the ultimate tryer of fact and law in the enforcement process, just as here it is the Texas State Board of Public Accountancy which is the real party in interest, which adopted the rules and which is the ultimate tryer of fact and law in the enforcement process.

Secondly, the Court found that in *Cantor* the state had no independent regulatory interest in the market for light bulbs and exemption of the program from the Sherman Act was not essential to the state's regulation of electric utilities. In contrast, like the regulation of public accountants by the Board, the Court held that regulation of the activities of the Bar was at the core of the state's power to protect the public.

Finally, the Court noted that in *Cantor* the state only had approved the light bulb program, whereas:

> ". . . The disciplinary rules reflect a clear articulation of the State's policy with regard to

> professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policy maker -- the Arizona Supreme Court -- in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." 433 U.S. at 362.

So, too, the rules of the Board, and Rule 14 in particular, have been subject to re-examination by the Board and the Legislature and thus reflect "a clear articulation of the State's policy with regard to professional behavior" of public accountants.

Every factor which the Court found in *Bates* to uphold the exemption of the rules of professional conduct of the State Bar of Arizona from the Sherman Act claim is present in the rules of professional conduct of the Board, and the same rule of law should be applied.

The decision of the Court in *Goldfarb v. Virginia State Bar, supra,* is equally supportive of the position of the Board. There, the Court noted that the Virginia Legislature had authorized its Supreme Court to regulate the practice of law. While the Virginia Supreme Court had adopted ethical codes dealing, in part, with fees, those codes did not authorize binding price-fixing. The State Bar enforced the fee schedules adopted by a county bar association -- a voluntary association and not a state agency. The Supreme Court in disposing of the *Parker* exemption claim, said:

> "Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompe-

titive activities of either respondent." 421 U.S. at 790.

Paraphrasing that statement, we *can* fairly say that the State of Texas through the rules of the Texas State Board of Public Accountancy *does* require the anticompetitive bidding activities which are "appropriate to establish and maintain a high standard of integrity in the profession of public accountancy." The clear inference of *Goldfarb* is that, had the Supreme Court rules provided the restraint, with legislative authorization, *Parker* would have applied just as it should apply here to the rules of the Board adopted with legislative sanction.

If the action of the California commission in *Parker v. Brown* was action of the State of California, then certainly action of the Texas State Board of Public Accountancy is action of the State of Texas. As Judge Gee has so cogently stated in his dissent, "As an agency of the State of Texas . . . the Board exercises the sovereign powers of the state, or it has no powers at all." The undisputed facts of this case compel a holding that promulgation of Rule 14 was the sovereign act of the State of Texas. The Board is a state agency. It exercises the police powers of the State in regulating the profession of accountancy. Its members are appointed by the governor with the advice and consent of the senate of the State. They are state officials. They take the constitutional oath of office. The administrative director of the Board is required to comply with the state ethics legislation by filing statements required of state heads of departments. Its employees are state employees, participating in the state employee's retirement system and receiving the benefits of the state group hospitalization program for which the state pays all or a part of the premiums.

The Board is audited by the State Auditor, and, as in this case while in the district court, it is represented by

the State Attorney General.

The Board is authorized to hold hearings. It may issue subpoenas and administer oaths. Its meetings are governed by the State's Open Meetings Act (Tex.Civ.Stat.Ann. art. 6252-17). It is subject to the Open Records Act (Tex.Civ.Stat.Ann. art. 6252-17a).

The Board certifies and licenses accountants. It is authorized to adopt rules and regulations "appropriate to establish and maintain a high standard of integrity in the profession of public accountancy" and may enforce those rules by revoking or suspending a certificate or permit.

But most important is the fact that, under Texas law, Rule 14 of the Rules of Professional Conduct of the Texas State Board of Public Accountancy itself had the force and effect of legislation. *Lewis v. Jacksonville Building & Loan Ann'n.*, 540 S.W.2d 307 (Tex. 1976); *Oxford v. Hill*, 558 S.W.2d 557 (Tex.Civ.App.-Austin 1977, writ ref'd)* and cases cited.

These facts require a holding, we submit, that Rule 14 of the Board was state action exempt from the Sherman Act. *Parker v. Brown*, 317 U.S. 341 (1943); *Bates v. State Bar of Arizona*, 443 U.S. 350 (1977); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978); *New Motor Vehicle Board v. Fox*, ___U.S.___, 99 S.Ct. 403, 58 L.Ed. 2d 361 (1978). Nothing said in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) or *Cantor v. Detroit Edison Company*, 428 U.S. 579 (1976) requires a different holding.

In *Princeton Community Phone Book, Inc. v. Bate*,

---

* Refusal of application for writ of error by the Texas Supreme Court indicates that the judgment of the Court of Civil Appeals is a correct one and that the principles of law declared in the opinion of the court are correctly determined. Rule 483, Texas Rules of Civil Procedure.

supra, it was claimed that an opinion of the Advisory Committee on Professional Ethics of the New Jersey Supreme Court violated the Sherman Act. The Court of Appeals for the Third Circuit held this claim barred by the *Parker v. Brown* state action exemption, even though the court found that the members of the Committee "were not enforcing a clear command of the New Jersey Supreme Court, but were interpreting an unclear command and enforcing their interpretation. . . ." (582 F.2d at 718).

If the record does not establish as a matter of law that promulgation of Rule 14 by the Board was exempt state action, then at the very least, there was a question of fact precluding summary judgment. This, in part, is the gist of the dissent of Circuit Judge Gee.

Among other things before the District Court when it determined that, as a matter of law, adoption of Rule 14 was not intended by the Legislature, was the affidavit of Lloyd J. Weaver, a former Chairman of the Board. His affidavit gives some of the history of legislation regulating the profession of public accountancy, as does the stipulation of the parties. These, taken together, at the very least, create a fact issue as to what was contemplated by the Texas Legislature when it authorized the Petitioner to adopt rules of professional conduct. They would certainly lead to the conclusion that one rule which the legislature must have contemplated was a rule prohibiting competitive bidding. This idea is reinforced by the fact that in 1971 the Texas Legislature adopted the Professional Services Procurement Act (Tex.Civ.Stat.Ann. art. 664-4) (Paragraph 19 of the Stipulation, Appendix F), which prohibits state agencies from contracting with professions, including public accountants, on the basis of competitive bids.

If there is any question as to whether a rule prohibiting competitive bids is one designed to maintain

a high standard of integrity, the affidavit of Lloyd Weaver certainly would seem to lay that to rest. At least, it cannot be said that, as a matter of law, the rule is inappropriate.

We submit therefore that, not only did the court err in holding, as a matter of law, that the promulgation of Rule 14 was outside the scope of the legislative intent, but rather, as a matter of law, the adoption of Rule 14 was a proper exercise of the authorization given to the Board by the Legislature, and, as such, is state action exempt from the Sherman Act. Parenthetically, no one has challenged Rule 14. It has been enforced. (See Affidavit of Hays Gorey, Jr.) But for the injunction granted by the District Court, it would still be enforced. No one has questioned the rule as an unlawful attempt by the Legislature to delegate its authority. No one has challenged the rule as being in excess of the authority delegated.

The Sherman Act requires a finding of a combination or conspiracy. The district court in its opinion of May 5, 1978, adopted by the majority of the panel of the Court of Appeals as its opinion, found the requisite combination or conspiracy from "facts which are not in dispute." It said:

> "Nonetheless, the Court agrees with Plaintiff that facts which are not in dispute compel a finding that Defendant in fact engaged in such a combination or conspiracy. . . .
>
> "The first described conduct [joint action of the board with a majority of permit holders who approved the terms of the rule] constitutes a conspiracy to fix prices since neither the board nor the permit holders could put the rule into effect acting alone; each acted knowing the assent of the other was required. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208

(1939). In addition, as in the case of the unwilling franchisee in *Perma Life* [*Perma Life Muffler, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968)], the permit holders' acquiescence, whether voluntary or involuntary, in the ban establishes a Sherman Act combination and provides an alternative basis for an injunction against the restriction on bidding. The Court agrees with Plaintiff that a combination has been shown by the undisputed and/or stipulated facts on record."

In fact, neither of these cited cases supports a holding that, as a matter of law, the facts of this case establish a combination or conspiracy. And it is indeed strange that neither the district court nor the majority of the Court of Appeals panel saw fit to refer to the language of *Parker v. Brown, supra,* with reference to a similar requirement by the California statute that 65% or more of the producers in the proposed zone and the owners of 51% or more of the producing factors have assented in writing to the program. This Court said:

". . . The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits.

. . .

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy or constraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. . . ." (317 U.S. at 352)

Finally, it cannot be overlooked that this case was decided on a motion for summary judgment, properly granted only "if the pleading, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Rule 56(c), Federal Rules of Civil Procedure.]

No evidence was heard and no opportunity was afforded the Board to present evidence as to the intention of the legislature in authorizing the Board to promulgate rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy. No evidence was heard and the Board was not furnished an opportunity to present any as to whether the Board and its permit holders entered into a combination or conspiracy to fix prices in violation of the Sherman Act. If the stipulated evidence and the evidence contained in the affidavit of Lloyd Weaver did not establish, as a matter of law, that promulgation of Rule 14 was state action entitling the Board to a summary judgment, then fact issues existed which could not be resolved in passing on a motion for summary judgment.

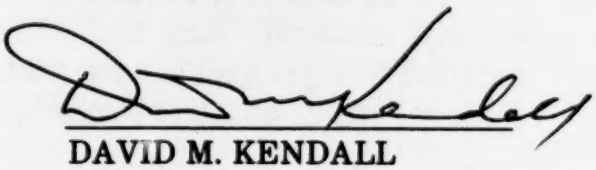
CONCLUSION

The importance of the questions presented by this appeal to state professional regulatory boards throughout the country warrants the granting of the writ of certiorari and reversal of the decisions below. It is impossible to reconcile the decision of the courts below with the decisions of this Court in *Parker v. Brown, supra,* and in *Bates v. Arizona State Bar, supra.*

WHEREFORE, PREMISES CONSIDERED, the Texas State Board of Public Accountancy respectfully

prays that the Court grant this, its petition for writ of certiorari and that upon the granting of such writ, that it reverse the judgments of the courts below.

Respectfully submitted,



DAVID M. KENDALL

Thompson & Knight
Two Wahrenberger House
208 West Fourteenth Street
Austin, Texas 78701
(512) 474-8211

Attorney For Petitioner

OF COUNSEL:

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

DOUGLAS B. OWEN
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, postage prepaid, by United States Certified Mail, return receipt requested to Mr. John J. Powers, III, Assistant Chief, Appellate Section, Antitrust

Division, United States Department of Justice, Washington, D. C. 20530, this 12 day of June, 1979.

DAVID M. KENDALL

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY,
Defendant-Appellant.

No. 78-2205.

United States Court of Appeals,
Fifth Circuit.

April 9, 1979

Appeal from the United States District Court for the Western District of Texas; Jack Roberts, Judge.

Before JONES, CLARK and GEE, Circuit Judges.

PER CURIAM:

The judgment appealed from is modified by deleting the paragraph numbered 3 providing:

> That Defendant be required to cancel those provisions of its rules of professional conduct which have as their purpose or effect the suppression or elimination of price competition among Defendant's permit holders;

and as modified is affirmed on the basis of the opinions of the district court dated February 18, 1977, and May 5, 1978. ___F.Supp.___.

GEE, Circuit Judge, dissenting:

If it is true that the rule here invalidated is that of a "State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation,"

then it is immune from antitrust attack. But the proper standard is somewhat more subtle than that ultimately applied by the district court below. Its opinion, adopted by my brothers, states:

> Defendant relies upon the case of *Parker v. Brown*, 317 U.S. 388 [341, 63 S.Ct. 307, 87 L.Ed 315] (1943), as authority for its assertion that it is immune from the provisions of the Sherman Act. Following the recent ruling of the Supreme Court in *City of LaFayette v. La. Power and Light Co.*, this Court concludes that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." 46 U.S.L.W. 4265, 4271 [435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364] (U.S. Mar. 28, 1978). In the instant case Rule 14 is not mandated by any state regulation or action. Section 5 of the Accountancy Act is cast in permissive, not mandatory, language and, furthermore, only allows adoption of rules appropriate for maintenance of high standards of integrity in the Accountancy profession. Nowhere in the Act does the State as sovereign mandate the anticompetitive conduct required by Rule 14, nor is such policy dictated by the State. Additionally, it cannot be said that Section 5 of the Act in any way concerns or contemplates "the kind of action complained of" here. 46 U.S.L.W. 4265, 4272 [435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364] (U.S. Mar. 28, 1978).
>
> Accordingly, the Court finds that the State has not directed or authorized the anticompetitive practice at issue and that the Defendant is not exempt from federal antitrust laws.

This reasoning seems to me to miss the point of *City of*

LaFayette in concluding that because the Texas State Board's authority is cast in permissive rather than mandatory language, the Board's action in establishing Rule 14 is not immune. As an agency of the State of Texas, established by the Public Accountancy Act of 1945, Tex.Rev.Civ.Stat.Ann. art. 41a (1969), the Board exercises the sovereign powers of the state, or it has no powers at all. Thus, it does not signify, in determining whether the sovereign has acted, that section 5 of the Accountancy Act-which delegates the Board rulemaking power-permitted but did not mandate Rule 14. Nor is the permissive-mandatory distinction helpful in analyzing whether the Board's disputed action is performed pursuant to a state policy to replace competition with regulation.

The real inquiry required by *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), is whether the state legislature *contemplated* the challenged anticompetitive restraints in delegating to the State Board its generous powers "to establish and maintain a high standard of integrity in the profession of public accountancy." Tex.Rev.Civ.Stat.Ann. art. 41a, §5. The Supreme Court explicitly stated that a political subdivision need not be able to point to a "specific, detailed legislative authorization" before it properly may assert a defense of immunity. 98 S.Ct. at 1138. An adequate state mandate exists when it is found " 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.*, *quoting* 5th Cir. opinion below. On the other hand, it is possible that careful inquiry into the factual record might show that the connection between this granted power and the Board's use of it is too tenuous to permit the conclusion that the legislature intended its scope of activity to encompass an anticompetitive regulation. If so, Rule 14 and the profession's conduct in response to it are not

immune to antitrust regulation.

Reviewing the judgment below in light of these standards and giving the Board the benefit of all favorable inferences to be drawn from the evidence, as is proper on review of a summary judgment, I can only conclude that either the legislature must have contemplated that some anticompetitive regulation would be enacted in the name of professional integrity or, at the least, that there remains a material issue of fact about whether or not it did.

There is evidence in the record that at least as early as 1931 competitive bidding was considered a serious problem confronting the accounting profession. General opinion in the profession at the time the Board received its mandate to ensure professional integrity viewed competitive bidding for accounting engagements as contrary to the best interests of accountants, clients, and the public generally. It was thought that bidding would ultimately result in the customer's not receiving the desired type and quality of services when unexpected problems developed in the course of an engagement. Moreover, the Texas Legislature has had ample opportunity in the course of considering the several amendments it has made in the statute, including section 5, to rein in the Board if it was thought to have exceeded its contemplated scope. This is, after all, a Texas law. In similar situations, Texas courts draw the inference that the legislature either approves the action or that the general dissatisfaction therewith is of insufficient strength to impel legislative action. *Moss v. Gibbs*, 370 S.W.2d 452 (Tex.1963). Finally, among the stipulations below is one that the state legislature has expressed a policy that there shall not be competitive bidding in awarding public contracts for the services of certified public accountants. Instead, such contracts are to be awarded on the basis of demonstrated competence and qualifications. Professional Services Procurement

Act, Tex.Rev.Civ.Stat.Ann. art 664-4 (1978).

On the state of this record, I think the court below erred in "finding" that the state has not authorized the challenged anticompetitive practice-certainly in concluding that beyond peradventure it has not done so. I would reverse for further proceedings addressing the issue posed by the Supreme Court in *City of Lafayette*, an issue which so far as I can tell has never been addressed.

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 78-2205

D. C. Docket No. A-76-CA-219

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before JONES, CLARK and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, except as modified in accordance with the opinion of this Court;

It is further ordered that the defendant-appellant pay to the plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

April 9, 1979

ISSUED AS MANDATE: MAY 15, 1979

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America,	*	
	*	
Plaintiff,	*	
	*	
V.	*	Civil No. A-76-CA-219
	*	
Texas State Board of Public Accountancy,	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

This is a suit by the United States seeking to enjoin the alleged violation of Section 1 of the Sherman Act, 15 U.S.C. §1, by Defendant. Both parties have moved for summary judgment after filing voluminous affidavits and stipulations.

The Defendant, the Texas State Board of Public Accountancy (hereinafter referred to as "the Board"), is organized and exists under the provisions of the Texas Public Accountancy Act of 1945, as amended, Tex. Rev. Civ. Stat. Ann. Article 41(a) [the Accountancy Act]. The Board consists of nine licensed accountants who practice in Texas. Members are appointed by the Governor and approved by the Senate; they must be practicing public accountants or certified public accountants holding permits to practice in Texas. Board members continue to practice their profession while serving on the Board. Members serve without compensation, but for the reimbursement of necessary expenses. Section 5 of the Accountancy Act provides that the Board "may promulgate, and may amend from time to time, Rules of Professional Conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy. . . .". Such rules

become effective only upon approval by a majority of permit holders voting in a referendum. Rule 14 of these Rules, at issue in this case, provides as follows:

> A public accountant shall not make a competitive bid for professional services.
>
> A competitive bid is defined as a proposal by a public accountant to a prospective client to perform professional services when such proposal quotes the compensation to be received for such services and it is given with the knowledge that similar proposals are being solicited concurrently from one or more other public accountants. The fact that a public accountant is solicited to make a proposal by a person or organization not already his client is indicative that similar proposals are being solicited from other public accountants and it shall be incumbent upon the public accountant to assure himself to the contrary by direct inquiry.
>
> Any proposal made under the foregoing circumstances is a competitive bid whether the proposed compensation is stated as a lump sum, a maximum amount, or any form of unit price, including per diem or per hour rates with or without a maximum sum.

For the most part, Rule 14 has been effective, and the initiation of formal enforcement proceedings has been necessary in only a few instances. According to the stipulations, Rule 14 prevents accountants from submitting competitive bids, quoting prices, or giving any type of fee estimate to a potential client prior to the engagement of the accountant when the accountant has reason to believe the proposals are being solicited concurrently from other public accountants. But for the rule, a number of accountants would engage in

competitive bidding in Texas.

Price Fixing as a per se violation of the Sherman Act:

Plaintiff argues that the restraint against competitive bidding envisioned by Rule 14 is a type of price fixing which is a per se violation of Section 1 of the Sherman Act. One need only read Rule 14 to see that it is the type of manipulation of the price-setting function of competitive markets which is condemned in a blanket manner by the Sherman Act. Rule 14 extinguishes directly price competition that would otherwise exist among Texas accountants through competitive bidding.

This conclusion is strengthened by the recent holding of the United States Supreme Court in *National Society of Professional Engineers v. United States*, ___U.S.___ (No. 76-1767, Decided April 25, 1978), affirming the earlier opinion rendered by the District of Columbia Circuit, 555 F.2d 978 (1977). This case concerned an agreement among competitors to refuse to discuss prices with potential customers until after the initial selection of an engineer. The Court stated:

> "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban 'impedes the ordinary give and take of the market place', and substantially deprives the customer of 'the ability to utilize and compare prices in selecting engineering services.' 404 F.Supp., at 460. On its face, this agreement restrains trade within the meaning of §1 of the Sherman Act." ___U.S.___ (No. 76-1767, pp. 12-13 slip opinion).

The Professional Engineers' bidding restriction provided that no fee information could be given to a prospective client "in the form of cost estimates or other proposals in terms of dollars, mandays of work required, or percentage of construction cost...". Rule 14 in the instant case proscribes the furnishing of a fee estimate whether stated as a lump sum, a maximum amount, or any form of unit price, including per diem or per hour rates with or without maximum sum. Rule 14, which on its face bans all price information, is at least as restrictive as that found to be improper in the *Professional Engineers* case. Since Rule 14 is clearly a per se violation of the Sherman Act, no inquiry into its precise effect or justification is required or permitted. *United States v. Socony-Vacuum*, 310 U.S. 150, 220-22 (1940).

Jurisdictional Requirement of Section 1 of the Sherman Act:

Defendant has in effect admitted that the conduct challenged in the complaint is within the flow of interstate commerce and has a substantial effect on such commerce, but it has not admitted to engaging in a combination or conspiracy with Texas accountants when it promulgated and enforced Rule 14. Nonetheless, the Court agrees with Plaintiff that facts which are not in dispute compel a finding that Defendant in fact engaged in such a combination or conspiracy.

A conspiracy within the meaning of the Sherman Act arises from any agreement, express or implied, to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. *Duplex Printing Co. v. Deering*, 254 U.S. 443, 463 (1921). The essence of conspiracy is a voluntary assent to a common scheme or plan.

On the other hand, the Sherman Act also proscribes

concerted action that does not rise to the level of a common law conspiracy. Thus it is established that voluntary assent is not required to establish a Sherman Act "combination." In *Perma Life Muffler, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968), the Supreme Court held that a franchisee formed an unlawful combination with the franchisor "the day he unwillingly complied with the restrictive franchise agreements." See also, *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *Response of Carolina v. Leasco*, 537 F.2d 1307 (5th Cir. 1976) (finding that the requisite combination existed on the basis of firm and resolute enforcement of restrictions and the inferable acquiescence of those coerced).

Here Plaintiff asserts the concerted action is established in two ways: (1) Rule 14 was established through the joint action of Defendant which promulgated the rule and a majority of permit holders who admittedly approved its terms and (2) Texas permit holders generally have acquiesced in the ban on competitive bidding under the threat of disciplinary action by the Defendant which actively enforces the rule.

The first described conduct constitutes a conspiracy to fix prices since neither the Board nor the permit holders could put the rule into effect acting alone; each acted knowing the assent of the other was required. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). In addition, as in the case of the unwilling franchisee in *Perma Life*, the permit holders' acquiescence, whether voluntary or involuntary, in the ban establishes a Sherman Act combination and provides an alternative basis for an injunction against the restriction on bidding. The Court agrees with Plaintiff that a combination has been shown by the undisputed and/or stipulated facts on record.

Suffice it to say that the Court does not find persuasive

the cases and reasoning advanced by Defendant to show there has been no combination or conspiracy.

Defendant's asserted "immunity" from federal anti-trust laws:

Defendant relies upon the case of *Parker v. Brown*, 317 U.S. 338 (1943), as authority for its assertion that it is immune from the provisions of the Sherman Act. Following the recent ruling of the Supreme Court in *City of LaFayette v. La. Power and Light Co.*, this Court concludes that "the *Parker* doctrine exempts only anti-competitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." 46 U.S.L.W. 4265, 4271 (U.S. Mar. 28, 1978). In the instant case Rule 14 is not mandated by any state regulation or action. Section 5 of the Accountancy Act is cast in permissive, not mandatory, language and, furthermore, only allows adoption of rules appropriate for maintenance of high standards of integrity in the Accountancy profession. Nowhere in the Act does the State as sovereign mandate the anticompetitive conduct required by Rule 14, nor is such policy dictated by the State. Additionally, it cannot be said that Section 5 of the Act in any way concerns or contemplates "the kind of action complained of" here. 46 U.S.L.W. 4265, 4272 (U.S. Mar. 28, 1978).

Accordingly, the Court finds that the State has not directed or authorized the anticompetitive practice at issue and that the Defendant is not exempt from federal antitrust laws. It is, therefore,

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment is hereby GRANTED and the Defendant's Motion for Summary Judgment is hereby DENIED and, accordingly:

1. That Defendant be enjoined from continuing,

maintaining, or renewing the above-stated conspiracy and combination and from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having similar purposes or effects, and from adopting, ratifying, or following any plan or practice having similar purposes or effects;

2. That Defendant be enjoined from promulgating, publishing, distributing or otherwise suggesting any rule prohibiting competitive bidding by Defendant's permit holders;

3. That Defendant be required to cancel those provisions of its rules of professional conduct which have as their purpose or effect the suppression or elimination of price competition among Defendant's permit holders;

4. That Plaintiff recover the costs of this suit.

ENTERED the 5 day of May, 1978, at Austin, Texas.

/s/
JACK ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America	*	
	*	
v.	*	Civil Action No. A-76-CA-219
	*	
Texas State Board of Public Accountancy	*	
	*	

ORDER

Came on this day for consideration by the Court the above styled cause. The Court, having carefully considered Defendant's motion to dismiss, the briefs in support of and opposition to the motion, and the other papers on file in this case, is of the opinion that the motion to dismiss should be denied.

The United States brought this antitrust suit against the Texas State Board of Public Accountancy (TSBPA) seeking injunctive relief to restrain it and its members from promulgating, suggesting or enforcing any rule prohibiting competitive bidding by TSBPA permit holders. Plaintiff also seeks an injunction requiring Defendant to cancel those provisions of its current rules of professional conduct and every other resolution or statement of policy that has the purpose or effect of suppressing or eliminating price competition among TSBPA permit holders. Defendant moved to dismiss the complaint, alleging that the complaint is insufficient to allege properly that there has been a contract, combination or conspiracy in restraint of trade and that the Defendant is immune from suit under the Sherman Act pursuant to the holding of *Parker v. Brown*, 317 U. S. 341 (1943).

The Court finds that both of these alleged grounds for dismissal are insufficient to require dismissal of this

cause of action. Plaintiff's pleadings are clearly sufficient to give the Defendant notice of what is being alleged. FED. R. CIV. P. 8(a). If Defendant has need of any further specification of the nature of the charges, that information can be sought through discovery.

Defendant's allegation that this case must be dismissed pursuant to the Supreme Court's holding in *Parker v. Brown* is likewise without merit. This is not the first time that these same parties have been before this Court and litigated the issue of whether or not the TSBPA is immune from antitrust scrutiny pursuant to *Parker v. Brown.* In the prior action, *Texas State Board of Public Accoutancy v. United States of America*, Civil Action No. A-74-CA-270, this Court set aside a civil investigative demand by the United States on the ground that the TSBPA was exempt from antitrust scrutiny, and therefore could not be a person under investigation pursuant to 15 U.S.C. § 1312(a). This Court's order, finding that the TSBPA was exempt from antitrust scrutiny pursuant to *Parker v. Brown*, was summarily reversed by the Fifth Circuit, and the Supreme Court denied certiorari. This history of the prior litigation certainly belies any argument by Defendant that it is exempt from antitrust scrutiny pursuant to *Parker v. Brown.* Furthermore, cases decided since that prior litigation clearly indicate that the Defendant is not immune from antitrust scrutiny because of the relationship between the Defendant and the State of Texas.

There is, as *Parker v. Brown* clearly established, an exemption from the antitrust laws for a state or its officers or agents when they are acting as commanded by the state legislature. On the other hand, a state cannot give antitrust immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful. *Parker v. Brown, supra* at 350-51. The Supreme Court has recently

addressed the scope of the exemption created by *Parker v. Brown* in *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975). In *Goldfarb*, the Supreme Court stated, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." 421 U. S. at 790. The Court then stated that it is not sufficient that the anticompetitive conduct be "prompted" by state action, noting that the "anticompetitive activity must be compelled by the direction of the State acting as sovereign" if it is to be afforded the *Parker v. Brown* immunity from antitrust scrutiny. 421 U. S. at 791. The Court went on to state that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members" *Id.* Thus, *Goldfarb* makes it clear that in order for a state agency to claim that its actions are exempt from antitrust scrutiny, not only must the agency be one that is itself created for by the state legislature, but furthermore, the particular anticompetitive activity in question (i.e. the rules restricting competitive bidding in this case) must also be compelled by the direction of the State acting as a sovereign.

The Fifth Circuit has recognized the limitation on *Parker v. Brown* immunity that the Supreme Court set out in *Goldfarb*. In *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), the Fifth Circuit stated:

> "A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. . . . [T]he connection between a legislative grant of

> power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.

532 F.2d at 434. Clearly, this is a test that cannot readily be applied at this stage of the proceedings. The question of whether or not a particular anticompetitive activity was encompassed within the scope of the alleged statute authorizing the action is one that must be considered in light of all of the facts.

Applying these teachings on the scope of the *Parker v. Brown* exemption to the antitrust laws to the instant case, the crucial issue that the Court must decide is whether or not, as a matter of law, Defendant's rule prohibiting competitive bidding is a rule that was required by the State acting as sovereign, and therefore, as such, is exempt from the strictures of the antitrust laws. The Court finds that the statute requiring the establishment of the TSBPA and setting forth its powers and duties, TEX. REV. CIV. STAT. ANN. art. 41(a), was designed to regulate the practice of accountancy in the State of Texas so that members of the public would be assured of the quality and standards of those who practiced in this state as public accounts or certified public accounts. The Court can find no basis for any allegation that the State, acting as sovereign, intended or required that the Defendant and accountants in the State of Texas create the particular anticompetitive practice in question, and therefore, this practice is not exempt from antitrust scrutiny under the doctrine of immunity created in *Parker v. Brown*. Since the State did not specifically require the activity in

question, it is not immune from antitrust scrutiny. Although there are many parallels between the facts in *Parker v. Brown* and the instant case, the crucial distinction between *Parker v. Brown* and this case is that in *Parker* the very purpose of the state action was to supplant the operation of the competitive market in establishing the price for raisins, and if the program were to be effective, it had to control the price of raisins by a mechanism other than the free, competitive market, while in the instant case, the scheme of public regulation is not designed to negate the competitive market's effect on the fees charged by accountants, but rather to assure that those accountants who are competing for business within the State are qualified to serve the public as accountants. Thus, despite the many similarities between the operation of the state regulations in question in *Parker v. Brown* and the regulatory scheme in this case, the crucial distinction between the cases is that the state program in *Parker* required exemption from the antitrust laws if it were to be effective, while here, the particular anticompetitive practice in question is not necessary to the scheme of state regulation established in art. 41(a). Accordingly, it is

ORDERED, ADJUDGED and DECREED that Defendant's Motion to Dismiss should be, and hereby is, DENIED.

Entered this 18th day of February, 1977, at Austin, Texas.

/s/
JACK ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-2205

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Western District of Texas

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 4-9-79, 5 Cir., 197___, ___F.2d___).

(May 7, 1979)

Before JONES, CLARK and GEE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the

Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

Judge Gee dissents from denial of petition for rehearing en banc for the reasons stated in his dissent from the panel opinion.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

Form 704-2

APPENDIX E

Art. 41a. Public Accountancy Act of 1945

Name

Section 1. This Act may be cited as the "Public Accountancy Act of 1945".

Definitions

Sec. 2. (a) The term "Board" when used in this Act means the "Texas State Board of Public Accountancy."

(b) The term "person" when used in this Act shall, unless the context indicates otherwise, mean individuals, partnerships and corporations.

(c) The term "state" when used herein includes any state, territory or insular possession of the United States, or the District of Columbia.

Acts not restricted

Sec. 3. (a) Nothing contained in this Act shall be construed as applying to restrict any official act of any County Auditor, or other officer of the state, county, municipality, quasi-municipality, or other political subdivision thereof, or any officer of a Federal department or agency, or of their assistants, deputies or employees while working in their official capacities.

(b) Nothing contained in this Act shall prohibit any person not a certified public accountant or public accountant from serving as an employee of a certified public accountant or partnership composed of certified public accountants and/or public accountants holding a permit to practice issued by the Texas State Board of Public Accountancy; provided, however, that such employee shall not issue any accounting or financial statements over his name.

(c) Nothing contained in this Act shall prohibit a certified public accountant or a registered public

accountant of another state, or any accountant who holds a certificate, degree or license in a foreign country, constituting a recognized qualification for the practice of public accountancy in such country, from temporarily practicing in this state on professional business incident to his regular practice outside this state; provided, that such temporary practice is conducted in conformity with the laws of Texas and the regulations and rules of professional conduct promulgated by the Board.

State Board of Public Accountancy

Sec. 4. The Texas State Board of Public Accountancy shall consist of nine (9) members, each of whom shall be a citizen of the United States and a resident of this State. Members of the Board and their successors shall be appointed by the Governor, with the advice and consent of the Senate, and shall be accountants in public practice; at least five (5) of whom shall hold certified public accountant certificates issued under the laws of this State; and the other four (4) shall be public accountants in public practice who shall hold permits issued under the laws of this State or certified public accountants in public practice who shall hold certified public accountant certificates issued under the laws of this State. The term of office of each member of the Board shall be six (6) years or until his successor is appointed. Vacancies occurring during a term shall be filled by appointment for the unexpired term. The Governor shall remove from the Board any member whose certificate or permit to practice has been voided, revoked or suspended.

Reappointment of board member

Sec. 4. (a) A Board member, who has served as a member for six (6) consecutive years, shall not be eligible for reappointment until a lapse of two (2) years shall have occurred between the end of the term of his

last prior appointment and the beginning of the new term of a new appointment.

Application of Sunset Act

Sec. 4b. The Texas State Board of Public Accountancy is subject to the Texas Sunset Act;[1] and unless continued in existence as provided by that Act the board is abolished, and this Act expires effective September 1, 1979.

Powers and duties of Board

Sec. 5. The Board shall administer the provisions of this Act. The Board shall formally elect a chairman and a secretary-treasurer from its members and may adopt such rules as it deems necessary for the orderly conduct of its affairs. The Board may promulgate, and may amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy, after notice to all holders of valid permits to practice public accountancy in this State. Such notice shall set forth the proposed rules of professional conduct, or amendments, and the time when same shall be voted on by public accountants holding valid permits under this Act. No such rule or amendment shall be operative until approved by a majority of those voting at such election. The voting shall be by mail and under such reasonable rules and regulations as the Board may prescribe. The Board shall declare the results of such election and proclaim the effective date of such rules of professional conduct, or amendments, and adopt reasonable means of notifying all public accountants of the results of such election. A majority of the Board shall constitute a quorum for the transaction of business. The Board shall keep a seal which shall be judicially noticed. The Board shall keep records of all proceedings and actions by and before the Board. The Board may employ such clerks as are necessary to assist it in the performance of its duties

and in the keeping of its records. The members of the Board who are noncertified public accountants shall have all the authority, responsibility and duties of any other member of said Board except as to the giving of examinations to candidates seeking the certificates of Certified Public Accountant, and except as to all other matters relating to the issuance of certificates as Certified Public Accountants as provided for in Section 12 of the Public Accountancy Act of 1945. The Board members holding certificates as Certified Public Accountants shall have the sole authority, responsibility and duty of performing all acts relating to such examinations and the issuance of certificates as Certified Public Accountants.

Compensation of Board

Sec. 6. Members of the Board shall not receive any compensation for their services, but shall be reimbursed for their necessary expenses incurred in the discharge of their official duties.

Expenses of Board

Sec. 7. All expenses incurred under this Act shall be paid from the fees collected by the Board under this Act. No expenses incurred under this Act shall ever be a charge against the funds of the State of Texas. The Board shall, as of December 31, 1946, and annually thereafter, report to the Governor of the State of Texas the receipts and disbursements under this Act, for each calendar year.

Prohibition against practicing without permit

Sec. 8. (a) No person shall assume or use the title or designation "certified public accountant," or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a certified public accountant, unless such person has received a certificate

as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a permit issued under Section 9 of this Act which is not revoked or suspended (hereinafter referred to as a "live permit"), and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act; provided, however, that an accountant of another state or foreign country who has registered under the provisions of Section 14 of the Public Accountancy Act of 1945, and who holds a live permit issued under Section 9 of this Act, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(b) No partnership shall assume or use the title or designation "certified public accountant" or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviation, sign, card or device tending to indicate that such partnership is composed of certified public accountants unless such partnership is registered as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(c) No person shall assume or use the title or designation "public accountant" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a public accountant, unless such person is registered as a public accountant under Section 11 or Section 13 of the Public Accountancy Act of 1945, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, or unless such person has received a

certificate as a certified public accountant under Section 12 or Section 13 of this or prior Acts, holds a live permit issued under Section 9 of this Act and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(d) No partnership shall assume or use the title or designation "public accountants" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership is composed of public accountants, unless such partnership is registered as a partnership of public accountants under Section 19 of the Public Accountancy Act of 1945, or as a partnership of certified public accountants under Section 17 of the Public Accountancy Act of 1945, and holds a live permit issued under Section 9 of this Act and all of such partnership's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof.

(e) No person shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations, "CA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA"; provided, however, that only a person holding a live permit issued under Section 9 of this Act and all of whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof may hold himself out to the public as an "accountant" or "auditor" or combinations of said terms; and provided further, that a foreign accountant registered under Section 14 of the Public Accountancy Act of 1945, who holds a live permit issued under Section 9 of this Act and all of

whose offices in this state for the practice of public accounting are maintained and registered as required under Section 10 hereof, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license or degree.

(f) No corporation shall assume or use the title or designation "certified public accountant," or "public accountant," nor shall any corporation assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," "registered accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations "CPA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA." If a corporation was registered under Section 10 of the Public Accountancy Act of 1945, prior to November 1, 1945, and holds a live permit under Section 9 hereof, it may use the same designations applicable to certified public accountants or public accountants hereinabove set out.

(g) No person shall sign or affix his name or any trade or assumed name used by him in his profession or business, with any wording indicating that he is an accountant or auditor, or with any wording indicating that he has expert knowledge in accounting or auditing, to any accounting or financial statement, or to any opinion on, report on or certificate to any accounting or financial statement, unless he has complied with the applicable provisions of this Act; provided, however, that the provisions of this Subsection shall not prohibit any officer, employee, partner, or principal of any organization from affixing his signature to any statement or report in reference to the financial affairs of said organization with any wording designating the position, title or office which he holds in said

organization, nor shall the provisions of this Subsection prohibit any act of a public official or public employee in the performance of his duties as such.

(h) No person shall assume or use the title or designation "certified public accountant" or "public accountant" in conjunction with names indicating or implying that there is a partnership or in conjunction with the designation "and Company," or "and Co.," or a similar designation if, in any such case, there is in fact no bona fide partnership registered under Sections 17 or 19 of the Public Accountancy Act of 1945; provided that a partnership lawfully using such title or designation in conjunction with such names or designation on the effective date of this Act, may continue to do so if it otherwise complies with the provisions of this Act.

Annual permits to practice

Sec. 9. Permits shall be issued by the Board to the following upon the payment of fees hereinafter specified:

(a) Holders of the certificate of "Certified Public Accountant" issued under this or any prior Acts.

(b) Such persons as are registered with the Board under the provisions of Section 10 of this Act.

(c) Such persons as are registered with the Board under the provisions of Section 14 of the Public Accountancy Act of 1945.

There shall be paid to the secretary-treasurer of the Board by all persons referred to in Subsections (a), (b) and (c) hereof an annual permit fee not to exceed Twenty Dollars ($20.00). All permits shall expire on the 31st day of December of each year, but shall, annually, be renewed for a period of one (1) year, upon the payment of a fee of not more than Twenty Dollars ($20.00), the Board being hereby given the authority and duty to

determine the amount of such renewal fee for each coming year on or before December 1 of each year, and to mail notices thereon each year by that date.

Failure of any permit holder to pay the annual permit renewal fee on or before January 31 of each year shall automatically cancel his permit. Any permit holder whose permit shall have been canceled because of failure to pay the annual permit renewal fee may secure reinstatement of his permit at any time within that calendar year upon payment of the delinquent fee together with a penalty of Ten Dollars ($10.00). After expiration of the calendar year for which the permit fee was not paid, no permit shall be reinstated except upon application and examination satisfactory to the Board. The Board shall have no authority to waive the collection of any fee or penalty.

Expiration dates of permits; proration of fees

Sec. 9A. The board by rule may adopt a system under which permits expire on various dates during the year. Dates relating to cancellation and reinstatement of permits shall be adjusted accordingly. For the year in which the permit expiration date is changed, permit fees payable on or before January 31 shall be prorated on a monthly basis so that each permit holder shall pay only that portion of the permit fee which is allocable to the number of months during which the permit is valid. On renewal of the permit on the new expiration date, the total permit renewal fee is payable.

Registration with the Board

Sec. 10. The following persons shall be registered with the Board for the practice of public accountancy in this state:

(a) All individuals and public accountants qualified or who may qualify under Section 11 of the Public

Accountancy Act of 1945.

(b) Partnerships qualified under Sections 17 or 19 of the Public Accountancy Act of 1945, as amended. The name or designation under which any partnership may be registered shall contain the personal name or names of one or more individuals presently or previously members thereof, and shall not contain any descriptive words indicating character or grade of service offered.

(c) Corporations qualified under Section 21 of the Public Accountancy Act of 1945. Provided, however, that no corporation may hereafter be created for the purpose of engaging in the practice of public accountancy within this state after the effective date of this Act. No corporate charters or corporate permits shall be renewed one (1) year after the effective date of this Act.

(d) Each office established or maintained in this state for the practice of public accounting in this state by a certified public accountant, or partnership of certified public accountants, or by a public accountant, or a partnership of public accountants, or by one registered under Section 14 shall be registered under this Act with the Board, but no fee shall be charged for such registration. Each such office shall be under the direct supervision of a resident manager who may be either a principal or a staff employee holding a permit issued by the Board which is in full force and effect; provided that the title or designation "certified public accountant" or the abbreviation "C.P.A." shall not be used in connection with such office unless such resident manager is the holder of a certificate as a certified public accountant and a permit issued by the Board, both of which are in full force and effect. Such resident manager may serve in such capacity only in one office at the same time. The Board shall by regulation prescribe the procedure to be followed in effecting such registrations.

All applicants for registration shall furnish satisfactory evidence that the applicant is entitled to registration. The Board shall have power to examine such applications and may refuse registration to any applicant who is unable to meet the standards imposed by this Act.

Individuals or public accountants entitled to register

Sec. 11. All persons listed in subdivisions (a), (b), and (c) of this Section who are citizens of the United States, or have declared their intention of becoming citizens, who reside within the State or have a place for the regular transaction of business therein, and who are twenty-one (21) years of age or over, and of good moral character, may register on or before the first day of November, 1947, with the Board as public accountants as provided in Section 10 of Acts 1945, Forty-ninth Legislature, page 517, Chapter 315;

(a) Persons engaged at the date of the enactment of this Act, or persons who have engaged for at least three (3) years during the ten (10) years immediately preceding the date of enactment of this Act, in the practice of public accountancy within the State either as individuals on their own account, members of copartnerships engaged in the practice of public accountancy, or as officers of corporations engaged in the practice of public accountancy;

(b) Any individual who at the date of the enactment of this Act, may be an employee of any person engaged in the practice of public accountancy or may be employed in any governmental agency, provided all such persons meet any one of the three (3) following standards:

(1) Who is a graduate of a junior college, senior college or university and has completed thirty (30) or more semester hours or the equivalent thereof in the

study of accounting, business law, economics and finance, of which at least twenty (20) semester hours or the equivalent thereof shall be in the study of accounting, and has been in the employ of a person engaged in the practice of public accountancy, or shall have been employed as an accountant or auditor in work of a nonroutine accounting nature which continually requires independent thought and judgment on important accounting matters for two (2) years preceding the date of application; or

(2) Who is a graduate of a junior college, senior college or university but has not completed the hours of study in subjects specified in subdivision (1) of this Section, and has been in the employ of a person engaged in the practice of public accountancy, or shall have been employed as an accountant or auditor in work of a nonroutine accounting nature which continually requires independent thought and judgment on important accounting matters for three (3) years preceding the date of application; or

(3) Who is a graduate of a high school or has an equivalent education and has been in the employ of a person engaged in the practice of public accountancy, or shall have been employed as an accountant or auditor in work of a nonroutine accounting nature which continually requires independent thought and judgment on important accounting matters, for at least four (4) years preceding the date of application;

(c) Individuals serving in the armed forces of the United States or any of the United Nations, who at the date of entering such service may be qualified as specified in either subdivision (a) or (b) of this Section. In the case of any person serving in the armed forces of the United States or any of the United Nations on the effective date of this Act, the Board shall extend the

time for compliance prescribed by any provisions of this Act, for a period of twelve (12) months from the time such person is honorably discharged from such service.

Certification of Certified Public Accountants

Sec. 12. The certificate of a "Certified Public Accountant" shall be granted by the Board to any person:

(a) Who is a citizen of the United States or who, if not a citizen, has lived in the State of Texas for the 90 days immediately preceding the date of submitting to the Board the initial application to take the written examination conducted by the Board for the purpose of granting a certificate of "Certified Public Accountant," or has maintained his permanent legal residence in Texas for the six months immediately preceding said date of submission; and

(b) Who is a resident of the State of Texas, or has a place of business therein, or, as an employee, is regularly employed therein, and provided that any person who shall have qualified to take the examination for the certificate in this state, and who, while so qualified shall have received credit for all or any part thereof, shall remain qualified under this Subsection until he receives his certificate; and

(c) Who has attained the age of twenty-one (21) years; and

(d) Who is of good moral character; and

(e) Who meets the requirements of education and experience as hereinafter provided:

(1) During the three (3) year period immediately

following the effective date of this Act the educational requirement shall be: (a) satisfactory completion of two (2) years of study at one (1) or more colleges or universities, recognized by the Board; or (b) graduation from a junior college, recognized by the Board, or such education as the Board determines to be substantially the equivalent thereof; and the experience requirements shall be four (4) years of accounting experience, satisfactory to the Board, as a certified public accountant in any state, or as a public accountant registered or entitled to register under Sections 11 or 13 hereof, or in public practice under the guidance of such a certified public accountant or public accountant, or in an activity comparable thereto, or in any combination of such types of experience, in work of a nonroutine accounting nature, which continually requires independent thought and judgment on important accounting matters; or such education and experience requirements may be those set out in (2), (3), or (4) below:

(2) During the second three (3) year period following the effective date of this Act, the educational requirement shall be either (a) that specified in (1) above and, in addition, satisfactory completion of what the Board determines to be substantially the equivalent of an accounting major, including related courses in other areas of business administration; and the experience requirement shall be three (3) years of the experience described in (1) above; or (b) graduation from an accredited high school, plus two (2) years of study of accounting or related subjects in one (1) or more colleges or universities, recognized by the Board, plus six (6) years of experience under the supervision of a Certified Public Accountant in work described in (1) above, in which event such Certified Public Accountant or

Certified Public Accountants, if the applicant has been employed by more than one (1), shall certify to the Board that the applicant has, during such six (6) year period, had the experience described in (1) above.

(3) After the expiration of six (6) years from the effective date of this Act, the educational requirement shall be either (a) a baccalaureate degree conferred by a college or university recognized by the Board, with a major in accounting, or with a nonaccounting major, supplemented by what the Board determines to be substantially the equivalent of an accounting major, including related courses in other areas of business administration; and the experience requirement shall be two (2) years of the experience described in (1) above; or (b) graduation from an accredited high school, plus two (2) years of study of accounting or related subjects in one (1) or more colleges or universities, recognized by the Board, plus six (6) years of experience under the supervision of a Certified Public Accountant in work described in (1) above, in which event such Certified Public Accountant or Certified Public Accountants, if the applicant has been employed by more than one (1), shall certify to the Board that the applicant has, during such six (6) year period, had the experience described in (1) above.

(4) At any time after the effective date of this Act the experience requirement shall be only one (1) year of the experience described in (1) above for any candidate holding a Masters Degree with a major in accounting or business administration from a college or university recognized by the Board, or holding a professional degree in accounting designated other than a Masters Degree but judged by the Board to be equivalent to that degree and to be at an appropriate professional level, if he has satisfactorily completed such number of semester hours in accounting, business administration and economics, and such related subjects as the Board shall

determine to be appropriate; and

(f) who shall have passed a written examination in theory of accounts, in accounting practice, in auditing, in commercial law as affecting public accounting, and in such other related subjects as the Board shall determine to be appropriate. A grade of at least seventy-five per cent (75%) on each subject shall be required as a passing grade.

Any candidate who meets the educational requirements under Subsections (1), (2), (3), or (4) of (e) above, and who is duly enrolled as an attorney in the Supreme Court of Texas and has complied with the provisions of the State Bar Act and is a member of the State Bar in good standing, shall be given credit for commercial law without taking the written examination on commercial law.

The Board may by written regulations provide for granting credit to a candidate for his satisfactory completion of a written examination at one sitting in any two (2) or more of the subjects specified in (f) above given by the licensing authority in any other state; provided, that when he took such examination in such other state he was not a resident of Texas, had no place of business in Texas, nor, as an employee, was he regularly employed in Texas. Such regulations shall include such requirements as the Board shall determine to be appropriate in order that any examination approved as a basis for any such credit, shall, in the judgment of the Board, be at least as thorough as that included in the most recent examination given by the Board at the time of the granting of such credit.

None of the educational requirements specified in (1), (2), or (3) of (e) above shall apply to a candidate who is registered as a public accountant under Section 11 of the Public Accountancy Act of 1945, as amended.

A candidate who has met the educational requirements but has not met the experience requirements provided for herein, shall be eligible to take the examination in all subjects except accounting practice without waiting until he meets the experience requirements, or a candidate who has met the educational requirements as specified in (3) (a) of (e) above shall be eligible to take the entire examination without waiting until he meets the experience requirements, provided that in either case he also meets the requirements of (a), (b), and (d) above of this Section.

A candidate for the certificate of certified public accountant who has successfully completed the examination under (f) above, shall have no status as a certified public accountant, unless and until he has met all of the requirements, has the requisite experience, and has received notice of his certificate as a certified public accountant.

The holder of a certificate heretofore issued under the provisions of Chapter 122 of the Acts of the 34th Legislature,[1] or under subsequent Acts, shall not be required to secure a new certificate as a certified public accountant under this Act.

The applicable educational and experience requirements under Subsections (1), (2) or (3) of (e) of this Section shall be those in effect on the date of his application for the examination or reexamination by which the candidate successfully completes his examination under (f) above. With reference to any candidate who has passed at least one (1) subject under any prior Act, the applicable educational and experience requirements shall be those in effect immediately prior to the effective date of this Act.

Any person who, at the effective date of this Act, has

[1]Arts. 31-41, repealed.

entered a program to meet the education and experience requirements of the Public Accountancy Act of 1945 as in force immediately prior to the effective date of the amendments by this Act, shall file with the Board within 180 days after the effective date of this Act, a written declaration thereof, and submit such proof thereof as the Board may require. After the filing of such declaration and proof, under rules and regulations prescribed by the Board, said person shall be allowed the time reasonably required to complete his program to meet the education and experience requirements in force immediately prior to the effective date of this Act, but not more than four (4) years after the effective date of this Act, and on completion of such requirements, if otherwise qualified to take the examination, he shall be permitted to make his application and take the examination under such education and experience requirements.

Every person who has met the requirements of (a), (b), (c), (d), (e), and (f) of this Section and is ready to receive his certificate as a "Certified Public Accountant," shall, before receiving such certificate, take an oath that he will support the Constitution of the United States and of this state, and the laws thereof, and will comply with rules of professional conduct promulgated under the Public Accountancy Act of 1945 as amended. This oath shall be administered by a member of the Board or by such other person as may be authorized by law to administer oaths.

Sec. 13. (a) The Board may in its discretion waive the examinaion of, and may issue a certificate of "Certified Public Accountant" to any person possessing the other qualifications mentioned in Section 12 of this Act who is the holder of a certificate as Certified Public Accountant issued under the laws of any state or territory (or the equivalent thereof issued in any foreign country), provided the requirements for such certificate

in the state or territory (or foreign country) which has granted it to the applicant were, in the opinion of the Board, at least equivalent to those required in this state at the time the applicant's original certificate was issued. The Board shall charge for the issuance of such a certificate as a "Certified Public Accountant," under this Section a fee of not more than Seventy-five Dollars ($75.00).

(b) Any person holding a permit under the laws of any state or territory to practice public accountancy, if such state or territory, in the opinion of the Board, has standards equal to those required by this state, shall be granted a permit by the Board if such state or territory admits public accountants of this state to practice in such state or territory; provided, however, no such permit shall be granted by the Board unless such person had made application for a permit to practice public accountancy to the licensing board of his own state not later than November 1, 1947. For such permits as are authorized by this Section the Board shall charge the same annual permit fees and reinstatement fees as are charged all other persons to whom annual permits are issued by the Board.

Certified Public Accountants of other states and persons holding similar titles in foreign countries-registration thereof

Sec. 14. A certified public accountant of another state or territory, or the holder of a certificate, license, or degree authorizing him to practice public accountancy in a foreign country, may register with the Board as a certified public accountant of such other state or territory, or as holding such certificate, license or degree of a foreign country, if the Board determines that the standards under which the applicant became a certified public accountant, or received such certificate, license, or degree, were as high as the standards of this

state at the same time for giving the Certificate of Certified Public Accountant. A person so registered may describe himself as a certified public accountant of the state or territory which issued his certificate, or may use the title held by him in a foreign country, provided that the country of its origin is indicated.

Examinations; re-examinations, and fees therefor

Sec. 15. All examinations provided for under the Public Accountancy Act of 1945, as amended, shall be conducted by the Board. The examination for the certificate of "Certified Public Accountant" shall take place as often as the Board deems necessary, but not less frequently than once each year. The time and place of holding examinations shall be duly advertised for not less than three (3) days in three (3) daily newspapers published, one (1) in each of three (3) principal cities in Texas, beginning not less than thirty (30) days prior to the date of each examination.

A candidate, who fails, shall have the right to apply for an additional examination, subject to the satisfaction of the Board that he continues to meet requirements of (a),(b), and (d) of Section 12 of this Act, and the following additional requirements: (1) if a candidate fails to score a grade of fifty per cent (50%) on any subject in an examination, the Board shall refuse to admit him to write that subject in the next succeeding examination; and (2) if a candidate has made application to write the examination at a session and he fails to submit a paper on any subject for which he is eligible at that session, the Board shall score a grade of less than fifty per cent (50%) for the candidate in that subject. Except for the foregoing requirements, a candidate, who has taken the examination under this Act or any prior Act, shall have the right to any number of reexaminations. The

additional requirements specified in (1) and (2) of this paragraph shall not apply to a candidate who is registered as a public accountant under Section 11 of the Public Accountancy Act of 1945, as amended.

Any candidate who, at the time of filing his application to take the examination, or reexamination, provided for herein, had prior to the effective date of this Act, passed one (1) or more subjects under any prior Act, or who shall, after the effective date of this Act, pass in a single examination two (2) or more subjects, or who is registered as a public accountant under Section 11 of the Public Accountancy Act of 1945, as amended, and who shall pass one (1) or more subjects after the effective date of this Act, shall have the right, subject to the approval of his application for reexamination under the provisions of the preceding paragraph, to be reexamined in the remaining subjects only, at subsequent examinations held by the Board, may receive credit for one (1) or more subjects in any subsequent examination, and when he shall have received credit for all subjects, he shall then be considered to have passed the examination.

The Board shall charge for the first examination of a candidate for certification as a "Certified Public Accountant" a fee of not more than Seventy-Five Dollar ($75.00), which shall be payable by the applicant at the time of making the initial application. For such subsequent examination, or reexamination, the fee shall not exceed for each subject for which he is eligible: Thirty Dollars ($30.00) for accounting practice, and Fifteen Dollars ($15.00) for each of theory of accounts, auditing and commercial law, which shall be payable by the applicant at the time of making the application for the subsequent examination or reexamination. Where

the applicant fails to be present for the examination and shows to the Board satisfactory reason for such failure, the Board may, in its discretion, refund any fee so paid, and relieve the candidate of the penalty in the second paragraph of this Section relating to the grade of less than fifty per cent (50%).

All fees provided for herein shall be paid to the secretary-treasurer of the Board.

It is further provided, that any applicant who has failed any such examination or examinations shall have a right to demand a copy, certified by the Board, of the questions and the answers thereto made by him upon any such examination, with the grade clearly shown, together with a copy of solutions to such questions; and the Board shall forthwith comply with such demand by delivering by registered mail to such applicant a true copy of the questions and his answers thereto, certified by the Board, together with a copy of solutions to such questions, and the Board may charge such applicant a reasonable fee therefor; and such application by the candidate shall be made within six (6) months after the grades are mailed to said candidate, and not thereafter.

Use of name "Certified Public Accountant"-abbreviations

Sec. 16. Any person who has received from the Board a certificate of Certified Public Accountant and holds a valid permit to practice, shall be styled and known as a "Certified Public Accountant" and may also use the abbreviation "C.P.A."

Use of name of "Certified Public Accountant"-partnerships

Sec. 17. A partnership engaged in this state in the practice of public accountancy may register with the Board as a partnership of certified public accountants

provided it meets the following requirements:

(a) At least one general partner thereof must be a certified public accountant of this state in good standing.

(b) Each partner thereof personally engaged within this state in the practice of public accountancy as a member thereof must be a certified public accountant in this state in good standing.

(c) Each partner thereof must be a certified public accountant of some state in good standing.

(d) Each resident manager in charge of an office of the firm in this state must be a certified public accountant of this state in good standing.

Application for such registration must be made upon the affidavit of a general partner of such partnership who is a certified public accountant of this state in good standing. Such affidavit must set forth the partnership name and the post office address thereof within the state, and the address of the principal office thereof, wherever located, together with the name, residence and post office address of each general partner. The Board shall in each case determine whether the applicant is eligible for registration. A partnership which is so registered and which holds a permit issued under Section 9 of this Act may use the words "certified public accountants" or the abbreviation "C.P.A.'s" in connection with its partnership name. Notification shall be given the Board, within one month, after the admission to or withdrawal of a partner from any partnership so registered.

Use of name "Public Accountant"

Sec. 18. Any individual qualified under this Act to register with the Board for the practice of public accountancy and who has so registered, and who holds a

valid permit for the practice of public accountancy, may be styled and known as a "public accountant."

Use of name "Public Accountant"-partnerships

Sec. 19. A partnership engaged in this state in the practice of public accountancy may register with the Board as a partnership of public accountants provided it meets the following requirements:

(a) At least one general partner thereof must be a certified public accountant or a public accountant of this state in good standing.

(b) Each partner thereof personally engaged within this state in the practice of public accountancy as a member thereof must be a certified public accountant or a public accountant of this state in good standing.

(c) Each resident manager in charge of an office of a firm in this state must be a certified public accountant or a public accountant of this state in good standing.

Application for such registration must be made upon the affidavit of a general partner of such partnership who holds a permit to practice in this state as a certified public accountant or as a public accountant. Such affidavit must set forth the partnership name and the post office address thereof within the state, together with the name, residence and address of each general partner of the partnership. The Board shall in each case determine whether the applicant is eligible for registration. A partnership which is so registered and which holds a partnership permit issued under Section 9 of this Act may use the words "public accountants" in connection with its partnership name. Notification shall be given the Board, within one month, after the admission to or withdrawal of a partner from any partnership so registered.

Prohibited designation and abbreviations

Sec. 20. Repealed. Acts 1961, 57th Leg., p. 608, ch. 289, § 12. Eff. Aug. 28, 1961.

Practice of public accountancy by corporations

Sec. 21. A corporation authorized to engage in the practice of public accountancy in this state and actually engaged in such practice at the time of the enactment of this Act, may register with the Board as a corporation engaged in the practice of public accountancy. Application for such registration must be made upon the affidavit of an officer of such corporation. The Board shall in each case determine whether the applicant is eligible for registration. A corporation which is so registered and which holds a permit issued under this Act may practice public accountancy under a corporate name indicating that it is engaged in such practice, provided it had such corporate name before the enactment of this Act.

Revocation or suspension of certificate or permit

Sec. 22. (a) After notice and hearing as provided in Section 23 of this Act, the Board may revoke or may suspend for a period not to exceed five (5) years, any certificate issued under Sections 12 or 13 of this or any prior Acts, or any registration granted under Sections 10 or 14 of this or any prior Acts, or may revoke, suspend or refuse to renew any permit issued under Sections 9 or 13 of this Act, or may reprimand the holder of any such permit for any one or more of the following causes:

(1) Fraud or deceit in obtaining a certificate as certified public accountant, or in obtaining registration under this or any prior Acts, or in obtaining a permit to practice public accounting under this Act.

(2) Dishonesty, fraud or gross negligence in the practice of public accounting.

(3) Violation of any of the provisions of Section 8 of the Public Accountancy Act of 1945, as amended by this Act.

(4) Violation of a rule of professional conduct promulgated by the Board under the authority granted by law.

(5) Conviction of a felony under the laws of any state or of the United States.

(6) Conviction of any crime, an element of which is dishonesty or fraud, under the laws of any state or of the United States.

(7) Cancellation, revocation, suspension, or refusal to renew authority to practice as a certified public accountant or a public accountant by any other state, for any cause other than failure to pay an annual registration fee in such other states.

(8) Suspension or revocation of the right to practice before any state or federal agency, for a cause which, in the opinion of the Board, warrants its action.

(9) Failure of a certificate holder or registrant to obtain an annual permit under Section 9 of the Public Accountancy Act of 1945, as herein amended, within either (a) three (3) years from the expiration date of the permit to practice last obtained or renewed by said certificate holder or registrant, or (b) three (3) years from the date upon which the certificate holder or registrant was granted his certificate or registration, if no permit was ever issued to him, unless such failure shall be excused by the Board pursuant to the provisions of said Section 9.

(10) Conduct discreditable to the public accounting profession.

(b) After notice and hearing as provided in Section

23 of the Public Accountancy Act of 1945, as herein amended, the Board shall revoke the registration and permit to practice of a partnership, if at any time it does not have all the qualifications prescribed by the section of this Act under which it qualified for registration.

After notice and hearing as provided in said Section 23, the Board may revoke or suspend the registration of a partnership or may revoke, suspend or refuse to renew its permit under Section 9 to practice or may reprimand the holder of any such permit for any of the causes enumerated in part (a) of this Section, or for any of the following additional causes:

(1) The revocation or suspension of the certificate or registration or the revocation or suspension or refusal to renew the permit to practice of any partner.

(2) The cancellation, revocation, suspension or refusal to renew the authority of the partnership or any partner thereof to practice public accounting in any other state for any cause other than failure to pay annual registration fee is such other state.

Procedure and review

Sec. 23. (a) The Board may initiate proceedings under this Act either on its own motion or on the complaint of any person.

(b) A written notice stating the nature of the charge or charges against the accused and the time and place of the hearing before the Board on such charges shall be served on the accused, not less than twenty (20) days prior to the date of said hearing, either personally or by mailing a copy thereof by registered mail to the address of the accused last known to the Board.

(c) At any hearing the accused may appear in person and by counsel, produce evidence and witnesses on his own behalf, cross-examine witnesses, and examine such

evidence as may be produced against him. The accused shall be entitled, on application to the Board, to the issuance of subpoenas to compel the attendance of witnesses on his behalf.

(d) The Board, or any member thereof, may issue subpoenas to compel the attendance of witnesses and the production of documents, and may administer oaths, take testimony, hear proofs and receive exhibits in evidence in connection with or upon hearing under this Act. In case of disobedience to a subpoena the Board may invoke the aid of any court of this state in requiring the attendance and testimony of witnesses and the production of documentary evidence.

(e) If, after having been served with the notice of hearing as provided for herein, the accused fails to appear at said hearing the Board may proceed to hear evidence against him and may enter such order as shall be justified by the evidence and a copy of such order shall be mailed by registered mail to the last known address of the accused. The Board is hereby authorized to grant continuances upon written request and, upon a showing of good cause for failure to appear at such hearing, set out in writing, signed by the accused and filed with the Board, the Board may reopen said proceedings and permit the accused to submit evidence in his behalf, provided further, that said written request to reopen is filed with the Board within twenty (20) days after a copy of said order has been mailed to the accused.

(f) A stenographic record of the hearings shall be kept and, if deemed necessary by the Board, a transcript thereof shall be prepared and filed with the Board.

(g) At all hearings the Attorney General of this state, or one of his assistants, or such other legal counsel as may be employed, shall appear and represent the Board.

(h) The decision of the Board shall be by majority vote thereof.

(i) Any person, firm or corporation adversely affected by any order, rule or decision of the Board may file a petition in the District Court of the county of his residence in Texas, or by a nonresident of Texas in the District Court of Travis County, Texas, setting forth the particular objection to such decision, rule or order, against the Texas State Board of Public Accountancy as defendant, such petition to be filed within thirty (30) days after the date a copy of such order is sent by registered mail to such person, firm or corporation. Service of citation may be had by leaving a copy thereof at the office of the Board in Austin, Travis County, Texas. The case shall be tried as other civil cases. The cause shall be tried and determined upon a trial de novo to the same extent as now provided for in the case of an appeal from the justice court to the county court. Either party to said action may appeal to the appellate court having jurisdiction of said cause. The Board shall not be required to give any appeal bond in any cause arising hereunder. Neither the Texas State Board of Public Accountancy nor any member thereof shall be liable to any person, firm or corporation charged or investigated by said Board, for any damages incident to such investigation, or any complaint, charge, prosecution, proceeding or trial.

(j) Upon application in writing and after hearing pursuant to notice, the Board may issue a new certificate to a certified public accountant whose certificate shall have been revoked, or may permit the reregistration of anyone whose registration has been revoked, or may reissue or modify the suspension of any permit to practice public accounting which has been revoked or suspended.

Penalties

Sec. 24. (a) Whenever in the judgment of the Board any person who is not the holder of a valid and existing

permit to practice public accountancy in this state has engaged in any act or practices which constitute the practice of public accountancy within this state, the Board may apply to the District Court of the county in which such person resides or has an office, for an injunction enjoining such person from engaging in the practice of public accountancy, and in such cases the Board shall not be required to give bond as a condition precedent to the issuance of such injunctive relief.

(b) Any person who violates any provision of the Public Accountancy Act of 1945, as amended, or of this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than Fifty Dollars ($50.00) and not more than Five Hundred Dollars ($500.00) or by imprisonment in county jail for not less than ten (10) days and not more than one (1) year or by both such fine and imprisonment, and each violation shall constitute a separate offense. Any complaints filed under the provisions of this Section shall be filed in the county where the offense occurred.

Partial invalidity

Sec. 25. If any section or any part of this Act shall be held to be invalid, such invalidity shall not affect the remaining portions thereof, it being the express intention of the Legislature to enact such Act without respect to such section or part so held to be invalid.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America,	§	
	§	
Plaintiff,	§	
	§	
V.	§	Civil Action No. A-76-CA-219
	§	
Texas State Board of Public Accountancy,	§	
	§	
	§	
Defendant.	§	

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action as follows:

1. For purposes of this Stipulation, the following terms shall have the meanings indicated:

(a) "Act" means the Public Accountancy Act of 1945, as amended (TEX.ANN.CIV.STAT., art. 41a);

(b) "TSBPA" means the Texas State Board of Public Accountancy;

(c) "Permit holders" means persons holding valid permits issued by the TSBPA to practice public accountancy in Texas and includes certified public accountants, public accountants and accounting partnerships;

(d) "Other accountants" means persons holding valid permits to practice public accountancy from states other than Texas who are permitted to practice within Texas;

(e) "Rules" means the Rules of Professional

Conduct promulgated by the TSBPA and approved by the vote of a majority of accountants holding permits to practice;

(f) "Competitive bid" and "competitive bidding" mean those acts encompassed and defined in Rule 14 of the Rules.

2. The agreements and admissions in this Stipulation shall be solely for the purpose of this proceeding and are not intended to and shall have no effect whatsoever in any other matter or proceeding.

3. The parties agree that this is a proceeding in equity brought by the United States under Section 4 of the Sherman Act, as amended (15 U.S.C. §4). The parties further agree that this Court has jurisdiction over the subject matter of this action and of the parties hereto. Nothing herein shall be construed as a waiver by TSBPA of its First or Third Defenses contained in its Answer.

4. In 1915, the 34th Texas Legislature enacted a law Acts 1915, 34th Leg., Ch. 122, p. 184] creating a State Board of Public Accountancy and providing for the examination of applicants for certificates as certified public accountants, etc. This statute was codified as articles 31 through 41 of the Revised Civil Statutes of the State of Texas. A copy of that Act is attached hereto and marked as "Exhibit A."

5. In 1932, the State Board of Public Accountancy issued a set of Rules, Regulations and Bylaws. A copy of these Rules, Regulations and Bylaws is attached hereto and marked as "Exhibit B." Article IX thereof is entitled "Professional Conduct." No rule of professional conduct therein contained proscribed competitive bidding by certified public accountants.

(a) In 1940, the State Board of Public Accountancy issued a set of Rules, Regulations and Bylaws which superseded the 1932 Rules, Regulations and Bylaws. A copy of these Rules, Regualtions and Bylaws is attached hereto and marked as "Exhibit C." Article IX thereof is entitled "Professional Conduct." No rule of professional conduct therein contained proscribed competitive bidding by certified public accountants. The 1940 Rules, Regulations and Bylaws were in effect until September 1, 1946 when, pursuant to the Act (see Par. 8, infra), the 1915 Act was repealed and the State Board of Public Accountancy abolished.

6. The American Institute of Accountants was a private, voluntary association of accountants. In 1934, the Council of the American Institute of Accountants adopted a resolution which provided as follows:

> "RESOLVED, That the Council of the American Institute of Accountants regards competitive bidding for professional accounting engagements as contrary to the best interests of members' clients and of the public generally and urges members of the Institute to endeavor by all means at their disposal to eliminate the practice of competitive bidding."

7. In 1941 the American Institute of Accountants, adopted a rule which provided as follows:

> "Rule 14. A member or an associate shall not make a competitive bid for professional engagements in any state, territory or District of Columbia, if such a bid would constitute a violation of any rule of the recognized society of Certified Public Accountants or the official board of accountancy in that state, territory, or

district." */

8. In 1945, the 49th Legislature of the State of Texas enacted the Act [Acts 1945, 49th Leg., Ch. 315, p. 517] now found as article 41a of the Revised Civil Statutes of the State of Texas. The Act, by its section 26, repealed the 1915 Act, supra, paragraph 4. It called for creation of the TSBPA consisting of five members appointed by the Governor with the advice and consent of the Senate and each of whom was to be an accountant in public practice holding a certified public accountant certificate issued by the TSBPA (§4).

---

*/ In 1972, the American Institute of Certified Public Accountants, a private voluntary association of accountants and the successor organization of the American Institute of Accountants, was sued for violation of Section 1 of the Sherman Act by the United States. United States v. American Institute of Certified Public Accountants, Inc., Civil No. 1091-72 (D.D.C.). Section IV of the Final Judgment, a consent decree in that action reads as follows:

> Rule 3.03 of the Code of Professional Ethics of the defendant which provides: "A member or associate shall not make a competitive bid for a professional engagement. Competitive bidding for public accounting services is not in the public interest, is a form of solicitation, and is unprofessional." is hereby declared null and void, and the defendant is ordered and directed, within 60 days from the entry of this Final Judgment, to delete the foregoing provision from its Code of Professional Ethics, rules, bylaws, resolutions, and any other policy statements any other provision which prohibits or limits the submission of price quotations for accounting services or which states or implies that such submission of price quotations for accounting services is unethical, unprofessional, or contrary to any policy of the defendant.

The Institute has since removed Rule 3.03 from its Code of Professional Ethics.

Section 5 of the Act provided, in part, as follows:

> "The Board may promulgate, and may amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy, after notice to all holders of valid permits to practice public accountancy in this state. Such notice shall set forth the proposed rules of professional conduct or amendments and the time when same shall be voted on by public accountants holding valid permits under this Act. No such rule or amendment shall be operative until approved by a majority of those voting at such election. . . ."

Section 22 of the Act provided, in part, as follows:

> "The Board shall have the power to institute proceedings against any person holding a certificate or permit under this Act to revoke or suspend the certificate or permit of such person who shall be charged and found guilty of: . . .(c) violation of any of the provisions of this Act or any of the rules or regulations promulgated by the Board."

9. In 1946, the TSBPA first promulgated Rules. A majority of the permit holders voting voted for the Rules and they became effective as of September 1, 1946. A copy of those Rules is attached as "Exhibit D." Rule 14 thereof provided as follows:

> "A public accountant shall not make a competitive bid for professional engagements in Texas, (or in any other state, territory, or the District of Columbia if such a bid would constitute a violation of any rule of the recognized society of public accountants or the

official board of accountancy in that state, territory or district)."

10. In 1947, the 50th Legislature amended section 11 of the Act with reference to the registration of individuals or public accountants as public accountants. [Acts 1947, 50th Leg., Ch. 266, p. 465.]

11. In 1951, the 52nd Legislature amended the Act in several respects. [Acts 1951, 52nd Leg., Ch. 369, p. 621.]

Section 4 of the Act was amended to provide that the Texas State Board of Public Accountancy consist of nine members appointed by the Governor with the advice and consent of the Senate and be accountants in public practice, five of them certified public accountants and four accountants holding permits. The term of office was two years.

Section 5 of the Act was amended to provide for the authority, responsibility and duties of Board members who are not certified public accountants. The language with reference to the promulgation of Rules in §5 was not amended.

12. In 1958, the TSBPA promulgated amended Rules, including an amended Rule 14. A majority of the permit holders voting voted in favor of the changes and they became effective as of September 1, 1959. A copy of the amended Rules is attached hereto as "Exhibit E." Rule 14 thereof provided:

"A public accountant shall not make a competitive bid for professional services.

"A competitive bid is defined as a proposal by a public accountant to a prospective client to perform professional services when such proposal quotes the compensation to be

> received for such services and it is given with the knowledge that similar proposals are being solicited concurrently from one or more other public accountants. The fact that a public accountant is solicited to make a proposal by a person or organization not already his client is indicative that similar proposals are being solicited from other public accountants and it shall be incumbent upon the public accountant to assure himself to the contrary by direct inquiry.
>
> Any proposal made under the foregoing circumstances is a competitive bid whether the proposed compensation is stated as a lump sum, a maximum amount, or any form of unit price, including per diem or per hour rates with or without a maximum sum."

13. In 1958, neither the Act nor the internal procedures of the TSBPA required that a public hearing be held before the promulgation or adoption of any Rule. No public hearing was held and no formal analysis of any impact upon the public was made prior to the promulgation and approval of Rule 14. The proposed amendments were circulated among the permit holders for comment prior to their formal promulgation by the Board.

14. Neither Rule 14 nor any other TSBPA rule or regulation purports to prohibit a permit holder or other accountant from stating to a customer, once the accountant has been engaged, what the cost or estimated cost of his services will be, whether stated in lump sum or maximum amount, or in any form of unit price, including per diem or per hour rates with or without a maximum sum or otherwise, and the customer is under no obligation to continue the engagement thereafter.

15. In 1959, the 56th Legislature amended the Act [Acts 1959, 56th Leg., Ch. 493, p. 1082] to increase the term of office of Board members from two years to six years.

16. In 1961, the 57th Legislature amended the Act in several respects [Acts 1961, 57th Leg., Ch. 289, p. 608.] Subsection (a) of §22 was amended to read, in part, as follows:

> "After notice and hearing as provided in Section 23 of this Act, the board may revoke or may suspend for a period not to exceed five (5) years, any certificate issued . . . or may reprimand the holder of any such permit for any one or more of the following causes:
>
> . . .
>
> (4) Violation of a rule of professional conduct promulgated by the board under the authority granted by law. . . ."

17. In 1970, the TSBPA promulgated amended Rules. A majority of permit holders approved the changes and they became effective July 16, 1970. A copy of the amended Rules is attached hereto as "Exhibit F." Rule 14 was not submitted to the permit holders for a vote and remained in the form adopted in 1959.

18. In 1971, the 62nd Legislature amended the Act by two separate statutes. [Acts 1971, 62nd Leg., Ch. 145, p. 931 and Ch. 146, p. 934.] The first of these amended § 9 of the Act, changing the various fees charged by the Board.

The second amended § 4 of the Act, providing that of the nine members of TSBPA all might be certified public accountants and made certain other changes.

19. In 1971, the 62nd Legislature enacted [Acts 1971, 62nd Leg., Ch. 38, p. 72] an Act known as the Professional Services Procurement Act which, in its entirety, reads as follows:

> "Section 1. This Act shall be known and may be cited as the 'Professional Services Procurement Act.'
>
> Sec. 2. For purposes of this Act the term 'professional services' shall mean those within the scope of the practice of accounting, architecture, optometry, medicine or professional engineering as defined by the laws of the State of Texas or those performed by any licensed architect, optometrist, physician, surgeon, certified public accountant or professional engineer in connection with his professional employment or practice.
>
> Sec. 3. No state agency, political subdivision, county, municipality, district, authority or publicly-owned utility of the State of Texas shall make any contract for, or engage the professional services of, any licensed physician, optometrist, surgeon, architect, certified public accountant or registered engineer, or any group or association thereof, selected on the basis of competitive bids submitted for such contract or for such services to be performed, but shall select and award such contracts and engage such services on the basis of demonstrated competence and qualifications for the type of professional services to be performed and at fair and reasonable prices, as long as professional fees are consistent with and not higher than the

published recommended practices and fees of the various applicable professional associations and do not exceed the maximum provided by any state law.

Sec. 4. Any and all such contracts, agreements or arrangements for professional services negotiated, made or entered into, directly or indirectly, by any agency or department of the State of Texas, county, municipality, political subdivision, district, authority or publicly-owned utility in any way in violation of the provisions of this Act or any part thereof are hereby declared to be void as contrary to the public policy of this State and shall not be given effect or enforced by any Court of this State or by any of its public officers or employees."

20. In 1973, the 63rd Legislature enacted [Acts 1973, 63rd Leg., Ch. 266, p. 622] an act having to do with the expiration dates of various licenses, permits, etc., issued by a number of different licensing boards. Section 5 of that act dealt with the Public Accountancy Act of 1945 by adding a § 9A having to do with the date upon which permits expired and permit fees became payable.

21. In 1973, the 64th Legislature enacted [Acts 1973, 64th Leg., Ch. 61, p. 136] what is known as the Administrative Procedure and Texas Register Act. Section 7 of that Act provides as follows:

"Before March 1, 1976, each agency shall file in the Office of the Secretary of State two certified copies of each rule existing on the effective date of this Act. Existing rules become effective immediately on filing with the Secretary of State."

The effective date of the Act is January 1, 1976 (§ 23). Pursuant to that statute, the TSBPA did, on or about the

31st day of December, 1975, file with the Secretary of State of the State of Texas its rules, among which is rule 401.03.00.014 which in text is identical to Rule 14 as contained in the 1959 and 1970 versions of the Rules.

The Administrative Procedure and Texas Register Act contains provisions in its § 5 for the adoption of rules by any agency. These provisions require, among other things, that at least 30 days notice of any intended adoption of a rule be published in the Texas Register with a request for comments and that, in the case of substantive rules, opportunity for public hearing must be granted if requested by at least 25 persons, by a governmental subdivision or agency, or by an association having at least 25 members.

Prior to adoption of the Administrative Procedure and Texas Register Act of Texas in 1975, TSBPA did not have a formal mechanism nor did it provide a public forum wherein consumers were heard or their public interest analyzed prior to a referendum vote on the Rules.

22. The following are the only legislative documents that were prepared contemporaneously with the Act:

a. Texas Session Laws for 1945. A copy thereof is attached hereto and marked as "Exhibit G."

b. Texas Senate Journal for 1945. A copy thereof is attached hereto and marked as "Exhibit H."

c. Texas House Journal for 1945. A copy thereof is attached hereto and marked as "Exhibit I."

d. Original Enrolled Senate Bill No. 176 and drafts. A copy thereof is attached hereto and marked as "Exhibit J."

23. A number but not all permit holders and other accountants in Texas would engage in competitive

bidding for professional engagements but for the proscription against it in Rule 14 and the sanctions that the TSBPA may, and has in the past, imposed upon violators of this Rule. For the most part, permit holders and other accountants have abided by Rule 14 and enforcement proceedings have been necessary in only the relatively few instances in which the TSBPA has become aware of possible Rule violations.

24. The existence and enforcement of Rule 14 has had and continues to have the following effects:

(a) Permit holders and other accountants have been prevented from quoting prices to prospective customers in Texas, whether in lump sum or maximum amounts, or in any form of unit price, including per diem or per hour rates with or without a maximum sum, and from otherwise disseminating price information during the selection process whenever an accountant has had reason to believe that proposals to perform professional services were being solicited concurrently from one or more public accountants.

(b) Customers have been unable to ascertain, in advance of engaging an accountant, the cost of accounting services to be performed.

/s/
HAYS GOREY, JR.
Attorney for Plaintiff, United States of America
Department of Justice
Washington, D.C. 20530

DAVID M. KENDALL
Attorney for Defendant, Texas State Board of Public Accountancy
First Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

EXHIBITS OMITTED